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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-972

STATE BOARD OF MEDICINE and DEPARTMENT OF HEALTH AND WELFARE of the State of Idaho, and IDAHO MEDICAL ASSOCIATION and IDAHO HOSPITAL ASSOCIATION, Petitioners,

v.

A. CURTIS JONES, JR., M.D., ROY J. ELLSWORTH, M.D., ROBERT B. MONTGOMERY, M.D., ST. LUKE'S HOSPITAL, LTD., and COMMUNITY HOSPITAL OF IDAHO FALLS, IDAHO, and KENNETH E. DROULARD, M.D., and J. R. FARBER, M.D., Respondents.

BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

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STATEMENT OF CASE

This was a declaratory judgment action filed by the respondents in the State District Court of Idaho's Fourth Judicial District. Respondents are a group of doctors who asked for the court's declaration because of the substantial uncertainty injected into their ability to obtain adequate professional liability insurance in light of the apparent liability limitations created by Idaho Code

§§ 39-4203, 39-4204, 39-4205 and 39-4210. 1975 Idaho Session Laws, Chapter 162. Specifically, the respondents challenged all of the "Hospital-Medical Liability Act" of Idaho within which those liability limitations are contained as being violative of the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and their counterparts in the Idaho Constitution. The complaint also urged that the act was unconstitutional as repugnant to the state constitution's prohibition on denials of access to the courts. (Complaint at ¶ IX).

Petitioners immediately answered admitting most of the allegations contained in the complaint but denying the unconstitutionality urged by respondents. Petitioners added no further claim based upon either the state or federal constitutions. (Answer at ¶¶ I and II). At no point during the course of the action from that time forward was there a change in the issues framed by the initial pleadings.

The declaratory judgment complaint also urged that, so long as there was a substantial question as to the constitutionality of the limitations of liability, the act imposed an obligation on the respondents and members of their profession to obtain liability insurance without limiting in any respect the amount of coverage which they are obligated to obtain. In other words, as a condition of their licensure, the act imposes an obligation to carry malpractice insurance, but, if the liability limitations are unconstitutional, then that obligation is virtually unlimited. Respondents challenge that pro-

vision as being also repugnant to the due process clauses of the state and federal constitutions.

As the petitioners state, the action then proceeded through a hearing before the state district court which held that, although the act survived its equal protection and due process challenges, it was unconstitutional as a violation of Article 1, Section 18 of the Idaho Constitution, the Idaho guarantee of access to the courts.

Petitioners appealed from that determination to the Idaho Supreme Court. That court reversed the district court on the application of Article 1, Section 18 of the Idaho Constitution and found that the statute did not bar access to the courts within the meaning of that constitutional provision. That decision removed the only substantial state constitutional issue framed by the pleadings and pursued by the parties on either side throughout the litigation. The Idaho Supreme Court then remanded the case to the district court for a factual hearing on the applicability of the equal protection and due process guarantees of the state and federal constitution, which guarantees the court held were substantially identical.

At the end of its opinion, the court suggested that there also should be a factual determination of whether the law might be one of the specific "local or special laws" prohibited by Idaho Constitution, Article 3, Section 19. That issue had not previously been raised by any party. As petitioners correctly point out in their petition, at pages 9-11, there is no provision of Article

3, Section 19 of the Idaho Constitution which reaches this case. As the Idaho court specifically stated in its opinion, "in our constitution, local and special laws are prohibited only in regard to the matters therein specifically mentioned. (Citations omitted)." 97 Idaho 859, 877, 555 P.2d 399, 417 (1976). In short, that last issue is not critical to the outcome of this case.

What is critical to the outcome of this case is the determination of the appropriate standards against which the Idaho Hospital-Medical Liability Act should be measured under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. For the reasons stated in the petition for certiorari filed in this action, and for the reasons further set out in this brief, we join with the petitioners in praying that a writ of certiorari issue to review the judgment of the Supreme Court of Idaho entered in the above-entitled case on October 15, 1976, and further set out in Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976).

RESPONDENTS' REASONS FOR SUPPORTING THE PETITION FOR CERTIORARI

I.

THE DECISION BFLOW MISCONCEIVES THE DECISIONS OF THIS COURT INTERPRFTING THE STANDARD OF REVIEW IN EQUAL PROTECTION AND DUE PROCESS CLAUSE CASES INVOLVING THE VALIDITY OF STATE STATUTES, AND WILL, THERFFORE, UNNECESSARILY CLOUD THE ISSUES OF THIS LITIGATION AND PROLONG RESPONDENTS' WAIT FOR THE RELIEF SOUGHT.

In 1971, this Court overturned the decision of the Idaho Supreme Court in Reed v. Reed, 93 Idaho 511, 465 P.2d 635, and found that an Idaho probate statute absolutely preferring males to females who were otherwise equally qualified violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. Reed v. Reed, 404 U.S. 71 (1971). In the course of that opinion, this Court analyzed the specific sections of the Idaho Probate Code which established the absolute discrimination in favor of males. It applied to that statute the traditional equal protection analysis which required only that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." That was a quote from Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). That quotation effectively restated the usual limited or minimal scrutiny test ordinarily employed in the absence of a suspect classification or discrimination touching a fundamental interest. See generally Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065, 1076-81, 1087 et seq. (1969). The test is whether or not the discrimination which is attacked on equal protection grounds is justified by a reasonable legislative purpose. The language employeed in the Reed case and in the Royster Guano Co. case is particularly applicable to the Reed factual situation because there the entire classification and its challenged exception were set up in the statute under attack. Thus the statute itself created its own classification system, and the statute's purpose was the one

which had to justify the discrimination. In the ordinary case, like this one, the statute creates an exception from an ordinary rule. Therefore, the question must be whether the exception is founded upon a proper purpose. That is nothing more than the traditional minimal scrutiny standard of equal protection examination repeatedly employed by this Court in McGowan v. Maryland, 366 U.S. 420 (1961); and the cases cited at 16-17 of the petition in this action.

The Supreme Court of Idaho took the language of this Court in Reed v. Reed, however, and concluded that a new, third equal protection standard had been thereby created. It assumed that there was something known as the "means-focus" test where "the discriminatory character of a challenged statutory classification is apparent on its face and where there is also patent indication of a lack of relationship between the classification and the declared purpose of the statute . . . ." 97 Idaho at 867, 871. Because the Idaho court has focused on the idea of establishing the appropriateness of legislation as a means to a specific legislative intention, it has concluded in this case that it must remand the decision to the state trial court for a full-blown fact finding about what the legislature actually had in mind and whether or not this particular statutory scheme is an appropriate means to achieving that end. See, e.g., 97 Idaho 873-874.

Thus, the Idaho Supreme Court's decision has made two fundamental errors in the interpretation of federal fourteenth amendment constitutional law. The first is that it has

created a new and hitherto unrecognized standard for review of legislative enactments under the fourteenth amendment's equal protection clause. Secondly, it has, based upon that misconception, found that it must look behind explicit legislative findings in order to both determine the actual intention of the legislature (as opposed to the legislation's apparent purpose) and whether the legislation appropriately performs the task intended.

These twin misconceptions should be corrected by this Court in this case for several reasons. First and foremost of these, discussed below, is that this is one of a class of decisions involving comparable "solutions" to expanding tort judgments. Another more directly relevant reason for reviewing this decision now is that these respondents may expect to be subjected to the same pressures which first gave rise to this legislation and then to their acton for a minimum of two more years while this case returns to the district court for an unnecessary factual proceeding based upon an irrelevant constitutional law concept. In the meantime, the constitutional law of the United States, as it is elaborated from time to time by the Idaho Supreme Court, will continue to be erroneously applied and, to the extent that Jones v. State Board of Medicine may be used as precedent in other jurisdictions seeking to grapple with the same problems of malpractice liability, generally altered.

II.

THIS PETITION PRESENTS FEDERAL QUFSTIONS OF GREAT SIGNIFICANCE TO THESE RESPONDENTS AND TO THE SEVERAL STATES AS THEY DEAL WITH INCREASING NEGLIGENCE AND OTHER TORT JUDGMENTS AND RESULTING UNAVAILABILITY OF LIABILITY INSURANCE.

The Idaho Malpractice Liability Statute has taken a blunt instrument approach to blunt attacking the impact on liability insurance caused by increasingly higher judgments. It simply made it impossible for judgments to increase. Idaho Code §§ 39-4203, 39-4204, 39-4205, and 39-4210 set absolute maximums on the amounts and kinds of recoveries available in either physician or hospital malpractice actions in Idaho. Those limitations are, essentially, $150,000 per patient and $300,000 per occurrence, and recoveries are restricted to only those based upon common law negligence subject to all existing defenses and to "compensatory damages" only in such cases.

In Idaho Code § 39-4202, the legislature of Idaho stated that it found that it was necessary to provide a stable liability insurance market for doctors and hospitals in order to insure continued availability of reasonably priced health services. Certainly an absolute ceiling on the kind and amounts of malpractice recoveries will achieve that end. Liability insurance benefits cannot exceed the statutory limits per case, so that, presumably, the cost to insurers has reached an absolute ceiling in Idaho. The constitutional question of whether such an

arbitrary limitation is the one which the Idaho Court attempted to finesse by requiring a "factual" determination.

Other states have tried differing versions of the same blanket limitation either in the malpractice area or in other areas where it has found to be in the public interest to limit potential liability. See, e.g., Simon v. St. Elizabeth Medical Center, 355 N.E.2d 903 (Ohio Com. Pl. 1976); Graley v. Satawathan, 343 N.E.2d 832 (Ohio Com. Pl. 1976); Wright v. Central DuPage Hospital Association, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Edwards v. State Military Department, 494 P.2d 891 (Ore. App. 1972) (workman's compensation liability limitations); State v. Silva, 478 P.2d 591 (Nev. 1971)(state tort liability limitation) See also Willis v. Department of Conservation and Economic Development, 55 N.J. 534, 264 A2d. 34 (1970).

Unfortunately, the legislature for Idaho failed to recognize that, by so limiting liability, it was at once denying a substantial property right to badly injured plaintiffs and improperly discriminating between indistinguishable classes of tort plaintiffs for the protection of a single class of defendant. It did so without creating any new remedy (unlike the standard workman's compensation case or "no fault" risk socialization legislation). In short, it did nothing to alleviate the burden imposed upon plaintiffs by the statute nor did it make malpractice claimants a functionally different category of tort plaintiffs overall. It did nothing more than leave grievously injured victims of medical malpractice in Idaho in no different or better position than other, less seriously hurt malpractice plaintiffs or any

tort plaintiffs of any other kind except that they are absolutely barred from ever being fully compensated.

The Supreme Court of Idaho also ignored this crucial fact about the Idaho legislation. The Idaho court briefly dismissed the challenge to the legislature's partial destruction of malpractice plaintiffs' right to compensatory damages for the full amount of injury which they suffer without providing any new comprehensive risk-spreading regime or remedy. 97 Idaho at 864. This holding of the Idaho court ignored the fact that, in Idaho, compensatory damages in tort, whether "special" damages or "general" damages, are recognized as valuable property rights of the litigants. See, e.g., Rogers v. Yellowstone Park Co., 97 Idaho 14, 539 P.2d 566 (1974) (on rehearing, 1975). Moreover, it ignores the obvious fact that there is nothing to distinguish the plaintiff in a serious medical malpractice negligence action from plaintiffs in less serious malpractice actions, automobile negligence actions, products liability actions, and other bodily injury tort cases. The only possible distinction was the legislature's purpose to favor a single class of all tort defendants by shifting a portion of some malpractice plaintiffs' property rights to that class in the form of reduced or stabilized insurance premiums. Obviously, if the Idaho law had totally replaced the negligence tort system for socializing risk and loss with a new comprehensive system for spreading the cost of malpractice, this case would not have presented such a bald discrimination against plaintiffs who are like all other plaintiffs except for having claimed to have been badly injured in the course of medical treatment.

Despite its obviously discriminatory character, the Idaho style absolute limit on kinds and amounts of recovery has appealed to other legislatures if it is constitutionally permissible. Unfortunately, the State of Idaho and the other states facing comparable malpractice liability insurance shrinkage are left with no clear holding as to the affect of this kind of direct action approach to the problem they all face. These respondents are faced with the prospect of substantial investments for liability insurance without certainty as to the maximum amounts which they must obtain under Idaho law. The constitutional impropriety of the approach taken in Idaho should be once and for all determined under correct standards by this Court in order that alternative comprehensive and sensitive legislative approaches to the problem may be developed in Idaho and throughout the country. This Court should, therefore, grant the writ in this case and conclusively declare the constitutional imperfections of the Idaho statute. This Court should remove the conflict between the standards of review in equal protection and due process cases articulated here and the standards created by the Idaho court in this case.

CONCLUSION

The entire core of this case rides on a correct interpretation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. We have focused specifically on the errors committed in the Supreme Court of Idaho in interpreting the applicable standard of review in equal protection cases. We do not mean thereby to be agreeing with the articulation given by that court on the due process

issue. As we have pointed out, tort damages in Idaho are property rights and do fall within the protection of the due process clause.

The mere fact that an unplead and unargued ancillary state constitution issue may be perceived as yet remaining, because of the Idaho Supreme Court's reference to the Idaho constitutional prohibition on "local and special" enactments, should not militate against granting certiorari in this case. A review of the pleadings and the Idaho Supreme Court opinion below clearly establishes that the "local and special" question is not the core of this case and will not in fact determine its outcome. Moreover, a review of the cases cited by petitioners and the language in the opinion of the Idaho Supreme Court in this case establishes that the "local and special laws" clause of the Idaho Constitution cannot be applied to legislation such as the Idaho Hospital-Medical Liability Act.

What is crucial to this case is the substantial departure from usual federal constitutional law standards created by the Idaho Supreme Court in its opinion below. As we have indicated, the misconception which gave rise to that departure has also given rise to an unusual requirement of a factual inquiry into the legislature's actual intention and the propriety of its legislative decision. If that misconception is not corrected in this Court, respondents will be forced into several more years of litigation under an incorrect constitutional standard without relief from the malpractice insurance situation which spawned the Idaho Hospital-Medical Liability Act. At the end of that ligitation,

because it will have proceeded under an incorrect constitutional standard, respondents will be no closer to a final determination of their original question than they were when they filed this action.

For all of the foregoing reasons, we join in the prayer of petitioners that this Court grant certiorari and provide a hearing on the merits in this case.

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